(1) Supreme Court, U.S.
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No. 01-____

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a class member who, upon receiving notice of a proposed class action settlement, objects and moves to intervene has standing to appeal the district court's approval of the settlement?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Robert J. Devlin was an appellant below. The Retired Employees Protective Association was also an appellant below.

The respondents in this Court, appellees below, are: Robert A. Scardelletti, Frank Ferlin, Jr., Joel Parker, and Don Bujold, as Trustees of the Transportation Communications International Union Staff Retirement Plan; and George Thomas Debarr and Anthony Santoro, Sr., individually and as representatives of subclasses of all persons similarly situated.

Other persons named in the court of appeals' caption, but who neither participated in the court of appeals nor are respondents here, are: Donald A. Bobo, R.I. Kilroy, F.T. Lynch, and Frank Mazur, Defendants; and A. Meaders, James H. Groskopf, Thomas C. Robinson, Doyle W. Beat, Miriam E. Parrish, Robert A. Parrish, Desmond Fraser, James L. Bailey, Dorothy Deerwester, Thomas J. Hewson, Clay B. Wolfe, Kenneth B. Lane, Brian A. Jones, and Charles O. Swasy, Parties in Interest.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert J. Devlin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

Petitioner seeks to appeal a judgment approving a class action settlement. The district court's orders denying petitioner's motion to intervene, approving the settlement, and entering a final judgment (Pet. App. B1, C1-C3) are unpublished. The Fourth Circuit's opinion (per Williams, J., joined by Anderson, D.J., sitting by designation; Michael, J., concurring in part and concurring in the judgment) (*id.* A1-A35) holding that petitioner lacks standing to appeal the settlement because he was not a named party in the district

court is designated a precedential opinion but is not yet published in the Federal Reporter.

JURISDICTION

The Fourth Circuit entered its opinion on July 27, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

STATEMENT OF THE CASE

This petition arises from a class action lawsuit. Respondents are the plaintiffs as well as the named representatives of the defendant class who were selected by the plaintiffs. Respondents have agreed among themselves to settle the suit.

Petitioner is a member of the defendant class who unsuccessfully sought to intervene in the suit to oppose the proposed settlement. Petitioner also filed timely objections to the settlement. The district court, however, denied petitioner's motion to intervene, rejected his objections, and approved the settlement.

The question presented is whether petitioner may appeal the district court's approval of the settlement. The Fourth Circuit held that petitioner did not have standing to appeal, expressly recognizing that petitioner would have been allowed to appeal in the Second, Third, and Ninth Circuits. It is also apparent that petitioner would have been allowed to appeal in the Seventh Circuit.

1. The suit underlying this petition involves the ERISA-governed retirement plan for the staff of the Transportation

Communications International Union. Petitioner was a full-time employee of the Union from 1963 until his retirement in 1983, at which time he began receiving retirement benefits under the Plan.

Prior to the events giving rise to this litigation, the Plan provided for a one-time, ten-percent cost of living adjustment ("COLA"). Subsequently, in early 1991, the Plan's trustees adopted a plan amendment ("the 1991 Amendment") to provide a more substantial COLA to offset the substantial reduction in retirees' effective benefits that had been caused by inflation. The 1991 Amendment provided that, every three years, beneficiaries would receive a COLA equivalent to the rate of inflation for that period, up to a maximum of ten percent per COLA ("the 1991 COLA").

Later in 1991, the Plan elected new trustees. Those trustees determined that the financial projections underlying the 1991 Amendment were incorrect, and in 1993 they eliminated the 1991 COLA for all subsequent retirees. The trustees determined, however, that as to persons (such as petitioner) who had already retired and were receiving benefits under the 1991 Amendment, the COLA was an "accrued" benefit that could not be eliminated through a plan amendment. See 29 U.S.C. § 1054(g)(1).

To recoup the costs of this accrued benefit to the Plan, the new trustees sued the old trustees, seeking damages for breach of fiduciary duties. The district court agreed that the old trustees had breached their fiduciary duties in approving the 1991 COLA based on faulty financial assumptions. The district court also initially agreed with the new trustees that the COLA was an accrued benefit for persons who had retired, see *Scardelletti* v. *Bobo*, 897 F. Supp. 913 (D. Md. 1995), but subsequently reversed itself, see *Scardelletti* v. *Bobo*, No. JFM-95-52, 1997 U.S. Dist. LEXIS 14498 (D. Md. Sept. 8, 1997). Petitioner was not a party to that litigation, and no party appealed from the district court's decision.

2. In response to the district court's decision, the new trustees unilaterally eliminated the 1991 COLA for all past and future retirees, and sought to confirm their right to do so through litigation. That suit led to the settlement between the new trustees and the class representatives that petitioner seeks to appeal.

a. To confirm their right to eliminate the 1991 COLA, the new trustees brought this defendant class action in the District of Maryland against all participants and beneficiaries of the plan, approximately 700 persons in total. The district court subsequently divided the defendant class into subclasses of retired plan beneficiaries and active plan participants.

Petitioner is a member of the retiree subclass. He is also the president of the Retired Employees Protective Association ("REPA"), a group composed of a majority of Union retirees, which seeks to preserve the retirees' benefits under the plan. The new trustees originally named petitioner as a class representative, but he declined to serve in that capacity. The trustees subsequently named a new class representative as a defendant in their suit.

The plaintiff trustees subsequently reached a proposed settlement with the class representatives. The details of the settlement are not relevant here, but in broad outline it abrogates the 1991 Amendment and essentially eliminates the 1991 COLA. The settlement thus has a very substantial negative financial effect on approximately 400 retirees such as petitioner, drastically reducing the retirement benefits that they had been receiving.

In 1997, when the trustees eliminated the 1991 COLA, petitioner's pension benefits were immediately reduced by 30.8%. Since that time, the elimination of the COLA has caused petitioner's benefits to be reduced by more than fifty percent. The figures are even higher for some other retirees.

b. Shortly after learning of the terms of the proposed settlement, petitioner formally moved to intervene in the case.

As a party intervenor, petitioner sought to take discovery, sought an injunction against eliminating the 1991 COLA, and sought to disqualify the class counsel. The district court denied the motion to intervene. Pet. App. B1. Because petitioner therefore lacked status as a party, the district court also denied as moot his motions for discovery, for an injunction, and to disqualify. *Id.*

Pursuant to Fed. R. Civ. P. 23(e), petitioner also received a notice, approved by the district court, directing class members to present all objections to the proposed settlement.[1] Petitioner properly filed timely objections on behalf of himself individually and also on behalf of REPA. Petitioner argued, for example, that the settlement was unlawful because (as the new trustees had *themselves* maintained in their prior suit against the old trustees) the 1991 COLA was in fact an accrued benefit under ERISA for pre-1991 retirees. Based on the district court's earlier, unappealed ruling to the contrary, respondents disagreed, although they had previously taken the same position.

Petitioner also maintained that the district court should not approve the settlement because it was unfair. In petitioner's view, the plan could afford to maintain the COLA at least in part by requiring active employees to make pension contributions, just as petitioner had done for many years before the plan became entirely employer funded. Respondents disagreed, arguing that the retirees had already recouped the value of their individual contributions.

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[1] C.A. App. 973-74 ("Any member of the Class who does not make his or her objection to the matters described in the Notice in the manner provided herein shall be deemed to have waived all objections and opposition to any and all matters to be considered at the Hearing and any and all subsequent hearings on these matters."); Fed. R. Civ. P. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.").

Respondents also argued that the settlement fairly reflected the risks to all parties in litigating the case to judgment.

The district court agreed with respondents and rejected petitioner's objections to the settlement. The district court advised petitioner's counsel, "if I'm wrong [in rejecting the objections], you got an appeal." C.A. App. 2585; see also C.A. Supp. App. 1240 ("I am perfectly clear that my order approving the class settlement should be appealed, should be reviewed by the Fourth Circuit in due course."). The court accordingly entered a final judgment approving the settlement. Pet. App. C1-C3.

3. The trustee respondents subsequently invoked the final judgment to seek an injunction (enforced upon threat of contempt sanctions) prohibiting class members from making any court filing in any other jurisdiction that related to the subject matter of the settlement. According to the trustees, "[a]ll those attacks [on the settlement] really belong, if anywhere, here and in the Fourth Circuit." C.A. Supp. App. 897 (injunction hearing). The basis for the injunction was that each class member was bound to the settlement as a matter of res judicata. The district court agreed and enjoined all class members "from making any filing in any forum against any person * * * that raises issues encompassed within the settlement of this action or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court." Pet. App. D2.

4. On petitioner's appeal from the district court's final judgment, a panel of the Fourth Circuit held (i) that the district court properly denied petitioner's motion to intervene and denied as moot petitioner's further motions that depended on his status as a formal party, and (ii) that petitioner lacked standing to appeal the district court's approval of the settlement.

a. The Fourth Circuit did not doubt that petitioner had standing to appeal the district court's denial of his motion to intervene, notwithstanding that petitioner was not a formal "party" in the district court. Rather, the Fourth Circuit held that the district court properly refused to permit petitioner to intervene on the ground that his motion was untimely. Pet. App. A10 ("Under either Rule 24(a) or 24(b), the application for intervention must be timely."). Permitting petitioner to intervene at the conclusion of settlement negotiations, the court concluded, "would have likely resulted in further delay and substantial additional litigation." *Id.* A12. On that basis, the court of appeals also affirmed the district court's denial of petitioner's motions for discovery, for an injunction, and to disqualify, all of which depended on petitioner's status as a formal party. *Id.* A13 n.11.[2]

b. The panel divided on the distinct question whether petitioner nonetheless had standing to appeal the district court's approval of the *settlement*. The majority held that petitioner lacked standing and therefore refused to reach the merits of his appeal. From the outset, the majority recognized the decades-long circuit conflict on this question:

> Courts have divided on whether a class member who objects but is denied intervention has standing to appeal the merits of the class action settlement. Some courts require successful intervention before a non-named class member may challenge the merits of a class settlement

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[2] Long before respondents reached a settlement, petitioner had filed letters with the district court seeking to intervene. C.A. App. 469-77, 731-37. Petitioner did so in response to the Second Circuit's conclusion in separate litigation that disputes relating to the COLA should be resolved in the District of Maryland. See *Devlin* v. *Transportation Communications Int'l Union*, 175 F.3d 121, 132 (CA2 1999). The Maryland district court concluded that it had no obligation to consider such letters (in contrast to petitioner's subsequent formal motion to intervene), and the Fourth Circuit agreed. Pet. App. A12. That issue is not relevant to this Petition and is not raised by it.

> on appeal. [collecting decisions of the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits dating to 1987] * * * Other courts, by contrast, broadly permit non-named class members to appeal the merits of a class settlement where they objected or tried to intervene below. [collecting decisions of the Second, Third, and Ninth Circuits dating to 1977].

Pet. App. A14-A17.

The panel majority initially rejected the view of some circuits that objectors' standing is precluded on the basis of this Court's three-paragraph per curiam opinion in *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988), which states that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled," and that "the better practice is for such a nonparty to seek intervention for purposes of appeal." *Marino* involved only an attempt to appeal a class action judgment by persons who were neither named parties nor even class members. The majority below therefore agreed with the Second and Third Circuits that *Marino* is properly distinguished because it "did not involve members of a class action who were objecting to a class settlement." Pet. App. A16 n.12.

Nevertheless, after detailing the circuits' competing rationales, Pet. App. A15-A21, the panel majority "agree[d] with the majority of courts that the need for effective class management and to avoid class fragmentation weighs strongly in favor of limiting the possibility that last-minute 'spoilers' who were not entitled to intervene below might unduly delay class settlement on appeal," *id.* A21. The majority "fail[ed] to see how effective class management can be accomplished if non-named class members who were not entitled to intervene before the district court can nevertheless usurp the role of the class representative and, in effect, act as intervenors by contesting the merits of the class settlement on appeal." *Id.*

c. Judge Michael disagreed. He would have held that petitioner had standing to appeal the approval of the settlement, although he would have sustained the settlement on the merits as within the district judge's discretion to approve. Pet. App. A30-A35. Judge Michael would have adopted what he regarded as the "better reasoned precedent hold[ing] that an unnamed, objecting class member has standing to appeal a district court order approving a class action settlement." *Id.* A30 (citing *In re PaineWebber Inc. Ltd. P'ships Litig.*, 94 F.3d 49 (CA2 1996); *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304 (CA3 1993); *Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173 (CA9 1977); 7B Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE, § 1797 ("Of course, if the class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise [of the class action] on appeal from the entry of the final judgment.")).

Judge Michael explained that the right of an objecting class member to appeal dates to early equity practice and is furthermore supported by constitutional and practical considerations. Pet. App. A31 (citing Joseph Story, COMMENTARIES ON EQUITY PLEADINGS § 94 (10th ed. 1892)). Because a class action settlement affects the rights of all class members, refusing to permit non-named class members to appeal raises due process concerns. *Id.* Under the majority's approach, class members will be largely unable to protect their interests because they generally do not learn of their interest in intervening until provided with notice of the proposed settlement by the district court, by which point (under the panel majority's holding) it is too late to intervene and thereby preserve their right to appeal. *Id.* A33-A34.

Judge Michael also maintained that the majority's approach undermines district courts' administration of class actions. The prospect that objectors may appeal provides an important check on collusive settlements by the class representatives and their counsel. Pet. App. A32. Moreover,

if prohibited from appealing, objectors will be more likely to opt out from the class or to institute collateral attacks on settlement orders. *Id.* A33 (citing *Walker* v. *City of Mesquite*, 858 F.2d 1071, 1075 (CA5 1988) (unnamed class members may "challenge the adequacy of class representation * * * by filing a separate lawsuit for that purpose")). Alternatively, district courts will be burdened with unnecessary motions to intervene, while courts of appeals, in turn, will be burdened by interlocutory appeals if intervention is denied. *Id.* A34. Conversely, as demonstrated by the experience of other circuits, there is no substantial risk that objectors will file meritless appeals of settlements, doubtless because in all but the most meritorious cases "the projected expenses will outweigh the potential for convincing the appeals court that the district court abused its discretion in approving a settlement after considering the objector's concerns." *Id.* A32.

d. The Fourth Circuit separately addressed petitioner's appeal from the district court's injunction against class members making any court filing in any other jurisdiction that relates to the subject matter of the settlement. The injunction rested on the fact that the entire class was bound by the settlement as a matter of res judicata. Notwithstanding the court of appeals' holding that objectors could not appeal the settlement, it nonetheless held that they could properly be enjoined from acting in derogation of it. Pet. App. A29. Rejecting petitioner's substantive challenges to the injunction, the court simply remanded the injunction for the district court to re-enter it in the form required by Fed. R. Civ. P. 65. *Id.*

5. This petition followed.

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted for two reasons.

First, the circuits are irreconcilably divided on this important question of federal law. The Fourth Circuit, and

indeed respondents themselves, acknowledged that the Second, Third, and Ninth Circuits would permit petitioner to appeal the district court's approval of the settlement. This Court recently granted certiorari to resolve a closely related circuit split, but the Court divided evenly, leaving both conflicts unresolved.

Second, the decision below conflicts with this Court's precedents holding that "quasi-parties" – persons with a direct relationship to and interest in a district court judgment, who have a recognized right to participate in the case, and who do in fact participate – have standing to appeal. This Court's precedents also recognize that class members have a due process interest in having an avenue to appeal a settlement that directly affects their rights. The policy arguments underlying the decision below not only do not justify deviating from this precedent, but they are also flawed. For example, the panel majority did not account for the beneficial effect of objectors' appeals in deterring collusive class action settlements.

I. THE CIRCUITS ARE DIVIDED OVER WHETHER OBJECTING CLASS MEMBERS HAVE STANDING TO APPEAL A CLASS ACTION SETTLEMENT.

The circuit conflict over whether an objecting class member has standing to appeal a district court's approval of a settlement is well recognized, entrenched, and outcome determinative. In rejecting petitioner's claim of standing, the Fourth Circuit avowedly refused to follow the longstanding precedent of the Second, Third, and Ninth Circuits, instead joining five other courts of appeals that had held to the contrary. Pet. App. A21. The trustees and the active subclass representative themselves acknowledged below that other circuits would have permitted petitioner to appeal. Holding that petitioner lacked standing, the panel majority refused to reach the merits of his appeal of the settlement. Pet. App. A23-A24.

The importance of the question is demonstrated by *Felzen* v. *Andreas*, 134 F.3d 873 (CA7), *cert. granted*, 524 U.S. 980 (1998), *aff'd by equally divided Court*, 525 U.S. 315 (1999). The Seventh Circuit in *Felzen* created a two-to-one circuit conflict on the narrower question whether an objecting shareholder has standing to appeal the settlement of a *derivative* action. The *Felzen* petition sought certiorari in substantial part on the ground that this Court's decision would help to resolve the broader conflict – now presented by this case – over the right of objectors to appeal settlements of non-derivative class actions. The Court granted certiorari but divided equally, leaving both conflicts unresolved.

As the court below recognized, three circuits allow objecting, non-named class members such as petitioner to appeal a district court's approval of a settlement. See Pet. App. A17 (citing *In re PaineWebber Inc. Ltd. P'ships Litig.*, 94 F.3d 49, 53 (CA2 1996) (allowing appeal if class member "objected to the proposed settlement at the Rule 23 hearing"); *Carlough* v. *Amchem Prods.*, 5 F.3d 707, 710 (CA3 1993) ("objecting class members will be able to appeal from any final order entered in the district court"); *Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (CA9 1977) (allowing appeal by non-named class members and stating that "[a]s members of the class, their legal rights are affected by the settlement and they have standing to sue")); see also *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304, 1310 (CA3 1993) (finding standing for a non-intervening shareholder to appeal settlement of a derivative suit when shareholder "attended the settlement hearing and voiced before the district court the same objections he now raises before us on appeal"); *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1309 (CA9 1982) ("Whatever the rule may be with respect to treating class members as parties for certain procedural purposes, it is clear that class members and parties are treated in substantially the same manner in regard to the substantive benefits and burdens of judgment. * * * [A] class member may appeal from an

order approving a settlement to which the member objects."), *aff'd based on absence of a quorum*, 459 U.S. 1191 (1983).[3]

The Seventh Circuit would permit petitioner to appeal as well, although on a different basis. That court would hold that, although petitioner does not have standing to appeal as an objector, he does have standing to appeal as an *intervenor*. As the Fourth Circuit noted in this case, the Seventh Circuit in *Felzen* held that only named parties may appeal. More recently, however, the Seventh Circuit has held that objectors must be permitted to intervene, even late in the case, in order to confer upon them standing to appeal. *In re Synthroid Mktg. Litig.*, No. 00-3164, -- F.3d --, 2001 WL 1000713, at *2 (Aug. 31, 2001) (per Easterbrook, J.); *Crawford* v. *Equifax Payment Servs.*, 201 F.3d 877, 880-81 (2000) (per Easterbrook, J.). The Seventh Circuit specifically rejects the Fourth Circuit's rationale that such appeals should be prohibited because they will interfere with administration of the case. "The possibility that we would see merit to their appeal cannot be called 'prejudice'; appellate correction of a district court's errors is a benefit to the class. Because only parties may appeal, it is vital that district courts freely allow the intervention of unnamed class members who object to proposed settlements and want an option to appeal an adverse decision." *Crawford*, 201 F.3d at 881. Instead, the Seventh Circuit holds that, if necessary to avoid undue interference with the trial proceedings, the district court may "limit[] the extent of the intervenors' rights to objecting and, if necessary, appealing." *Id.*

The Fourth Circuit, by contrast, held that petitioner could not appeal either as an intervenor or as an objector. As the

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[3] In dicta, panels of the Ninth Circuit have stated that the question is an open one in that court, *Powers* v. *Eichen*, 229 F.3d 1249, 1253 (2000); *Zucker* v. *Occidental Petroleum Corp.*, 192 F.3d 1323, 1326 (1999), *cert. denied*, 529 U.S. 1066 (2000), notwithstanding the clear holdings of prior panels.

majority below explained, the Fifth, Sixth, Tenth, and Eleventh Circuits agree. Pet. App. A14-A17 (citing *Cook* v. *Powell Buick, Inc.*, 155 F.3d 758, 761 (CA5 1998); *Shults* v. *Champion Int'l Corp.*, 35 F.3d 1056, 1061 (CA6 1994); *Gottlieb* v. *Wiles*, 11 F.3d 1004, 1008-09 (CA10 1993); *Guthrie* v. *Evans*, 815 F.2d 626, 628-29 (CA11 1987)); cf. *Microsystems Software, Inc.* v. *Scandinavia Online AB*, 226 F.3d 35, 42 (CA1 2000) (in appeal of an injunction binding upon non-parties, court rejects Second Circuit's precedent finding standing and adopts instead approach of *Felzen*, *Shults*, and *Guthrie*).

Subsequent to this Court's equally divided affirmance in *Felzen*, the circuits have adhered to their conflicting positions. The split over objecting class members' standing to appeal thus continues in the derivative, class action, and other contexts. As the Second Circuit explained in *Kaplan* v. *Rand*, 192 F.3d 60, 67 (1999), "While the plaintiffs' attorneys urge us to adopt specifically the no-intervention, no-standing rule of the Seventh Circuit, see *Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd sub nom California Pub. Employees' Retirement Sys.* v. *Felzen*, 525 U.S. 315, 119 S. Ct. 720, 142 L. Ed. 2d 766 (1999) (per curiam) (4-4 decision), we decline to do so." The Second Circuit then denied rehearing en banc without a single judge calling for a vote. Compare also *Agius* v. *Louisiana-Pacific Corp.*, 178 F.3d 1299 (table), No. 98-15641, 1999 WL 274521, at *1 & n.3 (CA9 Apr. 29, 1999) (unpub.) ("Our case law makes clear that because [the unnamed non-intervening class member] objected below he has standing to bring this appeal." (citing *Marshall* v. *Holiday Magic*, *supra*) (collecting cases reflecting circuit conflict)) with *In re Integra Realty Resources, Inc.*, No. 99-1344, -- F.3d --, 2001 WL 951332 (CA10 Aug. 21, 2001) (denying standing to appeal to unnamed defendant-class members who did not intervene); *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 838 (CA7 1999) (unnamed class members must

intervene in order to appeal "because only parties may appeal from an order settling a class action").

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS, UNDERMINES DUE PROCESS, AND RESTS ON FLAWED POLICY RATIONALES.

The district court's final judgment approving the settlement in this case has a substantial personal impact on petitioner, eliminating the 1991 COLA and binding him through res judicata. Because petitioner properly appeared in the district court and stated objections to the settlement, this Court's precedents deem him a "quasi-party" to the litigation with the concomitant right to appeal. Any doubt should be resolved in favor of holding that petitioner has standing to appeal in light of this Court's precedent recognizing the due process right of class members to protect their interests in class action litigation by contesting a proposed settlement. The Fourth Circuit's contrary holding rests entirely on policy arguments that are unmoored from this Court's decisions and are furthermore flawed. Among other things, the majority below failed to appreciate the substantial benefits of appeals by non-named class members, including their value in deterring collusive class action settlements among the named parties.

a. There is no question that respondents' settlement of this suit, approved by the district court over petitioner's objection, directly and substantially affects petitioner's personal interests. The settlement eliminates the COLA benefits that allow petitioner's pension to better keep up with inflation. Absent the settlement, petitioner could seek to enforce his right to the 1991 COLA in court.

The notice of the proposed settlement approved by the district court, however, advised petitioner that any objections to the settlement would be waived if not put forward at the court's fairness hearing. See *supra* at 5 n.1. Petitioner

properly filed objections and also appeared at the fairness hearing to press those objections.

When the district court nonetheless approved the settlement, the court's judgment became binding upon all of the class members, including petitioner, by operation of res judicata. See *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367 (1996); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). If there were any doubt about the preclusive effect of the settlement, it was emphatically put to rest when the new trustees successfully secured an injunction prohibiting any class member from making any court filing in any other jurisdiction that relates to the subject matter of the settlement.

b. The Fourth Circuit's decision that petitioner nonetheless may not appeal the settlement conflicts with this Court's precedents, which have recognized that standing to appeal exists not only for named parties but also for "quasi-parties" – *viz.*, persons who, like petitioner, are not named as formal parties to the litigation but (i) have a direct stake in the outcome, (ii) have a recognized right to participate in the case, and (iii) do in fact participate.

For example, in *Blossom* v. *The Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), Blossom had requested that the district court complete a foreclosure sale in which he had bid on the property, but the district court refused. When Blossom subsequently sought to appeal that ruling, the respondents objected that he was not a formal party to the case. This Court answered the question "[i]s the appellant so far a party to the original suit that he can appeal" in the affirmative, explaining that Blossom was entitled to appeal with respect to that part of the case in which he had properly participated. The Court found it clear that Blossom could not "appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid." 68 U.S. (1 Wall.) at 655. But the Court found it equally "well settled, that after a decree adjudicating certain rights between the parties to a suit,

other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject-matter of the litigation, which the court is bound to protect." *Id.* at 655-56. The Court cited as examples appeals by "[s]ureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment," all of whom "become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court." *Id.*

Subsequently, this Court held that a district court order approving fees for a trustee could be appealed by objectors who had appeared in the trial court but had not formally intervened. *Williams* v. *Morgan*, 111 U.S. 684 (1884). The Court cited *Blossom* and its progeny as sustaining quasi-parties' right "to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below." 111 U.S. at 699. The Court accordingly concluded that the objectors "had such an interest [in the trustee charges], and were so situated in the cause, that they had a right, by leave of the court, to except and object to the charges and allowances presented by the trustees and receivers, and that they had a right to appeal from the decree of the Circuit Court to this court." *Id.* at 700.[4]

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[4] *Blossom*'s progeny include *Hovey* v. *McDonald*, 109 U.S. 150, 155-56 (1883) (when non-party receiver received order in his favor, appeal could be brought against him); *Trustees* v. *Greenough*, 105 U.S. 527, 531 (1882) (trustees may appeal award in favor of complainant suing on behalf of a trust fund); *Sage* v. *Railroad Co.*, 96 U.S. 712, 714 (1878) (quasi-parties interested in order confirming a sale may appeal); *Hinckley* v. *Gilman, Clinton & Springfield R.R. Co.*, 94 U.S. 467, 469 (1877) (non-party receiver may appeal order directing him to pay money); and *Minnesota Co.* v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633-34 (1865) (appeal may be brought against persons who were "nominal parties" but not formal parties to the judgment).

Thus, in disagreeing with the panel majority in this case, Judge Michael was quite right to state that "[t]he rule that allows an unnamed class member to appeal a settlement order is rooted in early American equity jurisprudence." Pet. App. A31 (citing Joseph Story, COMMENTARIES ON EQUITY PLEADINGS § 94 (10th ed. 1892)). See also *West* v. *Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (CA2 1934) (L. Hand, J.) ("[I]f the decree affects [a non-party's] interests, he is often allowed to appeal."). That remains the view of respected commentators. 7B Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1797; 3B J. Moore, MOORE'S FEDERAL PRACTICE ¶ 23.80[5].

Under this Court's longstanding precedents recognizing the right of "quasi-parties" to appeal, petitioner is entitled to appeal the district court's approval of the settlement of this case. Petitioner has a direct stake in the settlement's elimination of the 1991 COLA, has a right under Fed. R. Civ. P. 23 to state objections to the proposed settlement, and did in fact properly put his objections forward. In fact, even the Fourth Circuit and respondents implicitly recognize the applicability of the "quasi-party" line of cases by not disputing that petitioner had the right to appeal from aspects of the district court's decision. For example, there has never been any question that petitioner had the right to appeal the district court's order enjoining the class members from making an court filing in any other jurisdiction that addresses the subject matter of the settlement. Nor has there been any question that petitioner had the right to appeal the denial of his motion to intervene. Petitioner plainly has standing to appeal those rulings because they affect him directly. But on that very same rationale, petitioner may appeal the district court's approval of the *settlement*, to which he has properly

objected, and which directly and profoundly affects his interests.[5]

If anything, petitioner's status as a "party" is far clearer than was true of the appellants in cases such as *Blossom* and *Williams*. Each member of the class in a class action is properly regarded as a "party," for each is fundamentally subject to the judgment as a matter of res judicata. See *supra* at 6, 15. To be sure, the Federal Rules of Civil Procedure do not require that each class member be named in the caption of the complaint. But that rule simply reflects the concern of modern civil procedure for ease of pleading and furthermore seeks to *benefit* class members by not requiring them to bear the costs of participating in the litigation. (Thus, the class members who are named defendants – here, respondents Debarr and Santoro – have that status not merely individually but in their capacity as representatives of the other class members. C.A. App. 345.) But the Fourth Circuit's rule perversely turns that benefit into an insurmountable burden on class members' ability to protect their rights by appealing.

c. Petitioner's standing to appeal is also supported by precedents recognizing that class members have a due process right to contest a settlement that may affect their interests. In *Phillips Petroleum Co.* v. *Shutts*, this Court held that the Fourteenth Amendment's Due Process Clause guarantees all class members the right to "receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel." 472 U.S. at 811-12. See also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (class action must "afford [absent class members] an opportunity to present their objections"). Given the longstanding "due process 'principle of general application'"

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[5] Indeed, the decision of this Court cited by some circuits as supposedly prohibiting appeals by non-named class members expressly recognizes a non-party's right to appeal the denial of intervention. *Marino*, 484 U.S. at 304.

that only formal parties are bound by a judgment, this Court has concluded that the "burden of justification rests on [those seeking] the exception." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

Due process concerns are only heightened in the context of this defendant class action, for "[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class." *Ortiz*, 527 U.S. at 846. Because the district court approved this class action under Fed. R. Civ. P. 23(b)(1), petitioner and the majority of retirees who object to the terms of the settlement were forbidden from opting out and litigating their interest in the dispute separately.[6] Furthermore, unlike plaintiff class actions suits, which are brought for the benefit of the members of a plaintiff class, a defendant class action like this suit is brought to *eliminate* a right held by each class member (here, the right to receive the 1991 COLA) by litigating against class representatives of their own choosing.[7]

Nor are the protections of the Due Process Clause limited to the right to state objections in the district court as opposed to on appeal. Although the Constitution does not mandate a right to an appeal, "it is almost axiomatic that every losing litigant in a one-judge court ought to have a right of appeal to a multijudge court." Robert Leflar, INTERNAL OPERATING

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[6] Of note, if the new trustees had affirmatively sought a money judgment from the class members – as opposed to an order permitting them to eliminate the money that they would have received under the 1991 COLA – the Constitution likely would have prohibited the suit altogether. See *Shutts*, 472 U.S. at 812 & n.3 (at least in context of money judgment, due process generally requires that absent party "be provided with an opportunity to remove himself from the class").

[7] Indeed, the Union paid the attorney's fees of the defendant class representatives on an ongoing basis throughout the litigation, including prior to the settlement. Under the settlement, the Plan would reimburse the Union for those fees.

PROCEDURES OF APPELLATE COURTS 4 (1976). The right to appeal an adverse judgment is thus "a fundamental element of procedural fairness as generally understood in this country." ABA Comm. on Standards of Judicial Admin., STANDARDS RELATING TO APPELLATE COURTS § 3.10 cmt., at 18 (1994).

Indeed, a class member's due process interest in pursuing an appeal is at its apex in the context of a settlement. The premise of class action litigation at the district court level is that the named parties will represent the interests of the absent class members. But upon settlement, the named class representatives obviously will not appeal. Indeed, they almost invariably will be obligated to defend the settlement. "It is no secret that in 'seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence.'" *Kaplan*, 192 F.3d at 67 (quoting *Bell Atl. Corp.*, 2 F.3d at 1310). On the Fourth Circuit's view, however, *no person* is permitted to protect the interests of objecting class members by appealing. In the context of this case, that result is fundamentally unfair not only to petitioner, but also to the majority of the members of the retiree class on behalf of whom he stated objections in the district court as the president of REPA.

It is no answer that objectors could intervene, then appeal on that basis. That is not a practical solution. Class members will undertake the costs of intervening – if ever – only once they receive notice of the proposed settlement, because it is only at that time that they will be able to determine whether the settlement is adverse to their interests. But under the Fourth Circuit's holding, a motion to intervene filed when the proposed settlement is disclosed to the class is properly denied as untimely. See Pet. App. A12-A13. Class members also may not intervene as a matter of right unless they can prove that the class representatives are inadequate, see Fed. R.

Civ. P. 24(a), which normally will not be the case before an inadequate settlement is disclosed.[8]

d. The Fourth Circuit's holding that non-named class members lack standing to appeal a district court's approval of a settlement rests not on any precedent of this Court, nor on an evaluation of the constitutional interests at stake, but rather on its perception of what rule would be best for class action litigation. Specifically, the majority below "fail[ed] to see how effective class management can be accomplished if non-named class members who were not entitled to intervene before the district court can nevertheless" appeal the settlement. Pet. App. A21.

Even if the panel majority correctly understood the effect of its holding on class action litigation, its rationale would not justify prohibiting an otherwise proper appeal. No doubt, class actions – like all other suits – could be simplified if fewer appeals were allowed. Indeed, class actions would be far simpler if class members' right to state objections were eliminated altogether. But the Due Process Clause protects the right of objecting class members to pursue their interests, both in the district court and on appeal. Put another way, the question whether petitioner has "standing" to appeal the district court's approval of the settlement is not properly answered merely by determining what result would be most

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[8] Class members as a practical matter often may not know that the suit even *exists* until they receive the notice of the proposed settlement. Class members most often will lack the sophistication or financial interest in the case to retain counsel, file a complaint as an intervenor, and accept the resulting burdens of disclosure and discovery. Cf. *Shutts*, 472 U.S. at 809 (given small individual stakes, as a practical matter class members often would not incur costs of pursuing individual claims). In this very case, the district court determined that petitioner would not be an appropriate class representative because (*inter alia*) he did not have the resources to litigate the case in Maryland, far from the New York-New Jersey area where he and the other officers of REPA reside, and where he had already commenced class action litigation against the Union in the Southern District of New York.

expedient for litigating the case in the district court. Although deprivations of due process may often be expedient, they are not rendered any less unconstitutional as a result.

In any event, the majority below profoundly misunderstood the effect of permitting objectors to appeal a district court's approval of a class action settlement. Because an objector lacks the extensive rights of a party or a party-intervenor, he cannot in any sense usurp "the role of the class representative," Pet. App. A21. Rather than contesting the class representatives' conduct of the litigation, an objector can only contest the fairness or legality of the ultimate settlement.

This case illustrates the distinction perfectly. The district court denied petitioner's motion to intervene, and on that basis denied as moot petitioner's motions for discovery, for an injunction, and to disqualify class counsel, all of which rested on petitioner's putative status as a formal party. As an entirely separate matter, the district court rejected petitioner's objections to the *settlement* – for example, that it unlawfully eliminated an accrued benefit of the retiree subclass and that it unfairly failed to retain the COLA by requiring current employees to make pension contributions, just as retirees had in the past. Petitioner's appeal of the district court's approval of the settlement involves only the latter contentions, which do not involve the class representatives' conduct of the litigation.

If anything, the decision below will undermine orderly administration of class actions. Under the Fourth Circuit's rule, an objector must formally intervene early in the litigation in order to preserve for appeal any objections he may eventually have to a potential settlement of undefined terms that the named parties ultimately may or may not reach. District courts therefore will be burdened with unnecessary protective motions to intervene filed by class members who would otherwise await notice of a proposed settlement in order to determine whether they had any actual objections.

That result would undermine one of the principal advantages of class action litigation: avoiding the necessity for class members to become involved in the course of the litigation. See *Shutts*, 472 U.S. at 810 (benefit of class action is that "absent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, or liability for fees or costs.").

Conversely, when motions to intervene are denied, class members may file interlocutory appeals that burden the courts of appeals. Pet. App. A34. As Judge Michael explained in his dissent, class members normally may simply opt out in order to protect their interests (at least in class actions brought under Fed. R. Civ. P. 23(b)(3), which permits class members to opt out), or may institute collateral attacks against the class representatives challenging the adequacy of the representation they provided. Pet. App. A33. See Adv. Comm. Note, Fed. R. Civ. P. 24 (objectors "should not be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interests by a later collateral attack. Rather he should, as a general rule, be entitled to intervene in the action.").

e. Finally, the majority below failed to appreciate that a rule permitting objectors to appeal will deter collusive class action settlements and will thereby protect the interests of all class members. Accord *Bell Atl. Corp.* v. *Bolger*, 2 F.3d at 1310. The attorneys for the class representatives will be more likely to structure a settlement to benefit the entire class if they know that class members' objections will receive a thorough review, including on appeal if necessary.

In addition, the appeals process "induc[es] trial court judges to make fewer errors because of their fear of reversal." Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 408-11, 425-26 (1995). The available data indicates that fairness hearings in district

courts tend to be exceedingly brief and generally do not result in changes to settlements crafted by the named parties. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1348 & n.14 (1995) (empirical evidence suggests that "courts have little ability or incentive to resist [proposed] settlements"; data shows median hearing lengths in two districts of 38 and 40 minutes); Federal Judicial Center, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 58 (1996) ("Approximately 90% or more of the proposed [class] settlements were approved without changes in each of the four districts."). Fairness hearings in some courts are "typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel" in which the district courts "engage in paeans of praise for counsel or lambaste anyone rash enough to object to the settlement." Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action & Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46-47 (1991).

Finally, objectors can play an important role on appeal in identifying flaws in a proposed settlement, and the courts of appeals' rulings can themselves provide important guidance for later cases. A prime example is this Court's seminal decision in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997) (holding that settlement-only class action must satisfy all requirements of Fed. R. Civ. P. 23). The *Amchem* respondents, who successfully challenged the named parties' settlement on appeal, were permitted to press their objections in the Third Circuit only because that circuit permits objectors to appeal.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 7, 2001

APPENDICES

APPENDIX A

United States Court of Appeals,

Fourth Circuit.

Robert A. SCARDELLETTI; Frank Ferlin, Jr.; Joel Parker; Don Bujold, as Trustees of the Transportation Communications International Union Staff Retirement Plan, Plaintiffs-Appellees,

v.

George Thomas DEBARR, Individually and as representatives of a class of all persons similarly situated; Anthony Santoro, Sr., Defendants-Appellees,

and

Donald A. Bobo; R.I. Kilroy; F.T. Lynch; Frank Mazur, Defendants,

v.

Robert J. DEVLIN; Retired Employees Protective Association, Movants-Appellants,

and

A. Meaders; James H. Groskopf; Thomas C. Robinson; Doyle W. Beat; Miriam E. Parrish; Robert A. Parrish; Desmond Fraser; James L. Bailey; Dorothy Deerwester; Thomas J. Hewson; Clay B. Wolfe; Kenneth B. Lane; Brian A. Jones; Charles O. Swasy, Parties in Interest.

Robert A. SCARDELLETTI; Frank Ferlin, Jr.; Joel Parker; Don Bujold, as Trustees of the Transportation Communications International Union Staff Retirement Plan, Plaintiffs-Appellees,

v.

George Thomas DEBARR, Individually and as representatives of a class of all persons similarly situated; Anthony Santoro, Sr., Defendants-Appellees,

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A. Meaders; James H. Groskopf; Thomas C. Robinson; Doyle W. Beat; Miriam E. Parrish; Robert A. Parrish; Desmond Fraser; James L. Bailey; Dorothy Deerwester; Thomas J. Hewson; Clay B. Wolfe; Kenneth B. Lane; Brian A. Jones; Charles O. Swasy, Parties in Interest.

Robert A. SCARDELLETTI; Frank Ferlin, Jr.; Joel Parker; Don Bujold, as Trustees of the Transportation Communications International Union Staff Retirement Plan, Plaintiffs-Appellees,

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George Thomas DEBARR, Individually and as representatives of a class of all persons similarly situated; Anthony Santoro, Sr., Defendants-Appellees,

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and

A. Meaders; James H. Groskopf; Thomas C. Robinson; Doyle W. Beat; Miriam E. Parrish; Robert A. Parrish; Desmond Fraser; James L. Bailey; Dorothy Deerwester; Thomas J. Hewson; Clay B. Wolfe; Kenneth B. Lane; Brian A. Jones; Charles O. Swasy, Parties in Interest.

Nos. 99-2619, 00-1411, 00-1525.

Argued Oct. 31, 2000.

Decided July 27, 2001.

Appeals from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, Chief District Judge. (CA-97-3464-FJM).

ARGUED: Arthur McKee Wisehart, Wisehart & Koch, New York, NY, for Appellants.

William Francis Hanrahan, Groom Law Group, Chartered, Barbara J. Kraft, Beins, Axelrod & Kraft, P.C., Washington, DC; Kenneth M. Johnson, Tuggle, Duggins & Meschan, P.A., Greensboro, NC, for Appellees.

ON BRIEF: Kahn, Smith & Collins, P.A., Baltimore, MD, for Appellants. Leonie Hassel, Groom Law Group, Chartered, Washington, DC, for Appellees Scardelletti, et al.

Before WILLIAMS and MICHAEL, Circuit Judges, and JOSEPH F. ANDERSON, JR., Chief United States District Judge for the District of South Carolina, sitting by designation.

OPINION

WILLIAMS, Circuit Judge:

Appellant Robert Devlin unsuccessfully sought to intervene to challenge a class action settlement in the United States District Court for the District of Maryland. Under the class settlement, the trustees (the new trustees)[1] of the Transportation Communications International Union Staff Retirement Plan (the Plan) and the named representatives of the

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[1] The new trustees are Appellees Robert Scardelletti, Frank Ferlin, Joel Parker, and Don Bujold.

class[2] agreed to the elimination of cost of living adjustment ("COLA") benefits that had been previously enacted by the Plan's former trustees[3] (former trustees) (we will refer to the appellees collectively as "the Trustees"). On appeal, Devlin asserts that he was entitled to intervene before the district court under Federal Rule of Civil Procedure 24(a) and (b) to challenge the settlement and that even if the district court properly denied his motion to intervene, he is nevertheless entitled to appeal from the district court's final order approving the settlement. Devlin also argues that the district court's injunction under the All Writs Act prohibiting him from collaterally attacking the settlement in another jurisdiction was improper under Federal Rule of Civil Procedure 65. We conclude that the district court did not err in denying Devlin's untimely motion to intervene and that Devlin, therefore, lacks standing to appeal the merits of the class action settlement. We reverse and remand the district court's All Writs Act injunction, however, so that the district court may articulate its reasons for issuing the injunction as required by Federal Rule of Civil Procedure 65.

I.

The Transportation Communications International Union (TCU) is a labor union representing approximately 85,000 employees, mostly in the railroad and service industries. The Plan is a defined benefits pension plan that covers TCU's officers and employees. In October 1990, the former trustees recommended that the Plan be amended to add a COLA adjustment equal to the increase in the COLA index for every three years after a participant's retirement. As a result of the

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[2] Appellee George Thomas Debarr is the named representative of the Active Subclass. Appellee Anthony Santoro is the named representative of the Retiree Subclass. Debarr and Santoro are parties both individually and as class representatives.

[3] The former trustees are Appellees Donald Bobo, R.I. Kilroy, F.T. Lynch, and Frank Mazur.

amendment, which became effective on January 1, 1991, the existing retirees received increases in their pensions based upon the number of years they had been retired.

In late 1991, TCU elected new officers and selected the new trustees to replace the former trustees. In 1993, however, it was revealed that the former trustees had relied upon an incorrect valuation of the Plan's liabilities in deciding to enact the COLA amendment and that enactment of the COLA amendment had increased the Plan's liabilities by approximately $20 million. The new trustees believed that they could not rescind the COLA benefits across the board because, under ERISA, they were prohibited from amending the Plan to reduce accrued benefits. *See* 29 U.S.C.A. § 1054(g)(1) (providing that accrued benefits "may not be decreased by amendment of the plan").[4] Accordingly, they amended the Plan to "freeze the COLA as it pertain[ed] to the future service accrual for active employees," (J.A. at 3), thereby "eliminating COLA increases based on future service under the Plan." (Appellee's Br. at 11.) The amendment did not, however, eliminate the COLA benefits for participants who were retired as of January 1, 1991.

In January 1995, the new trustees filed suit against the former trustees in the United States District Court for the District of Maryland seeking damages and an equitable decree declaring the COLA amendment void as a product of fiduciary breaches.[5] *See Scardelletti* v. *Bobo*, 897 F.Supp. 913 (D.Md. 1995); *Scardelletti v. Bobo,* No. JFM-95-52 (D.Md.

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[4] 29 U.S.C.A. § 1054(g)(1) provides:

> (g) Decrease of accrued benefits through amendment of plan
>
> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

[5] The new trustees requested "appropriate equitable relief" pursuant to ERISA § 502(a)(2) and (a)(3) for damages and to nullify the COLA amendment for all Plan participants.

Sept.8, 1997). The district court found in favor of the new trustees, agreeing that the former trustees had breached their fiduciary duties. The district court also concluded that the 1991 COLA benefit was not an accrued benefit for pre-1991 retirees such as Devlin because it had not been received prior to their retirement.[6] In accordance with the district court's decision, the new trustees amended the Plan and rescinded the COLA for participants who had retired prior to January 1, 1991 (the 1997 amendment).

On October 14, 1997, the new trustees filed the present action as a class action in anticipation of challenges to the 1997 amendment, seeking a declaration that the 1997 amendment was binding on all Plan participants or, in the alternative, that the 1991 COLA amendment was void as to all participants. The new trustees' original complaint named Devlin as a class representative for the Retiree Subclass because he previously had been active in challenging the new trustees' efforts to eliminate the COLA benefits. Devlin, however, refused to accept the position. The new trustees, therefore, named a new representative for the Retiree Subclass, Anthony Santoro.

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[6] The district court originally concluded that the COLA benefit was an accrued benefit for pre 1991 retirees. *See Scardelletti* v. *Bobo*, 897 F. Supp. 913, 916 (D.Md. 1995). As noted above, accrued benefits generally cannot be eliminated by amendments to the plan. *See* 29 U.S.C.A. § 1054(g)(1). The district court, with little elaboration and presumably relying upon § 1054(g), stated that "[u]nfortunately, the current trustees are caught between a rock and a hard place to remedy this situation because ERISA prohibits amendments of the Plan repealing an automatic COLA." *Bobo*, 897 F. Supp. at 916. It later reconsidered, however, stating that "if an employee works with the expectation that she is earning, and will receive, a pension benefit, an employer may not later decide not to give her the benefit that it has promised and she has earned. In the present case, Plan participants who retired prior to 1991 did not wo with the expectation that they would receive a COLA. Thus, the COLA was not an accrued benefit." *See Scardelletti v. Bobo,* No. JFM-95-52, at 18-19 (D.Md. Sept.8, 1997).

On February 9, 1999, the district court for the District of Maryland conditionally certified the class pursuant to Federal Rule of Civil Procedure 23(b)(1)[7] and divided it into two subclasses: those who would benefit from the removal of COLA (the Active Subclass), and those who would benefit from the retention of COLA (the Retiree Subclass). In May 1999, with the assistance of a magistrate judge, the new trustees and the class representatives agreed upon a settlement under which the COLA benefits would be eliminated in exchange for certain other benefits. Under the proposed settlement, it was agreed that the district court would enter a consent order declaring the 1991 COLA benefit void at its inception.

In the meantime, Devlin and four other retirees[8] were pursuing actions in the Southern District of New York alleging

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[7] Rule 23(b)(1) provides,

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests....

Fed.R.Civ.P. 23(b)(1).

[8] The four other retirees are Andrew Hagan, Thomas Hewson, Steven Milone, and Frederick Rinckwitz, who, along with Devlin, filed suit individually "and 'as agents on behalf of all' other retirees and their beneficiaries" against TCU. *Devlin* v. *Transportation Communications Int'l Union*, 173 F.3d 94, 97 (2d Cir. 1999). Hagan, Hewson, Milone, and Rinckwitz are not involved as individuals in the Maryland litigation, although Devlin moved to intervene on behalf of himself and the Retired Employees Protective Association (REPA).

claims under the ADEA and ERISA against TCU relating to their death benefits and medical benefits. They also included a claim relating to the 1997 Amendment, arguing that the 1997 Amendment was motivated by age discrimination. *See Devlin* v. *Transportation Communications Int'l Union*, 175 F.3d 121, 126 (2d Cir. 1999). On April 13, 1999, the Second Circuit affirmed the Southern District of New York's dismissal of Devlin's COLA claim, stating that "[t]he exact COLA issue that the appellants are pursuing ... is being addressed by the district court in Maryland.... It seems eminently sensible that the Maryland district court should resolve fully the COLA amendment issue, given that that court already ruled that the amendment could be repealed as to those who retired prior to 1991, and that court is already entertaining a suit in which the legality of such a repeal is at issue." *Id.* at 132. The Second Circuit also noted that "though Devlin did not want to be the lead defendant in [the Maryland class action] because the case was pending in Maryland and Devlin was residing in the Northeast, the fact remains that Devlin and others in his position can be actively involved in the case." *Id.*

Shortly after the Court of Appeals for the Second Circuit affirmed the dismissal of Devlin's challenge to the 1997 Amendment, Devlin became interested in the class action pending in the district court in Maryland. On April 20, 1999, Devlin's counsel sent a letter to the district court informally seeking to intervene in the class action. On May 12, 1999, Devlin sent another letter through counsel to the district court repeating his informal request to intervene and informing the district court that Devlin was "still await[ing] a response from Your Honor." (J.A. at 732.) For whatever reason, Devlin did not formally move to intervene, nor did he take any further action to follow up on these letters, until September 1999.

On August 27, 1999, the Trustees filed a motion for preliminary approval of the settlement in the District of Maryland. On September 10, 1999, Devlin finally sought leave to

intervene pursuant to Federal Rule of Civil Procedure 24(a) and (b).[9] At the November 12, 1999 fairness hearing, the district court denied Devlin's motion to intervene as "absolutely untimely." (J.A. at 2685.) It then examined the considerations leading to the settlement, heard Devlin's objections, and approved the settlement. Because Devlin was not a party, the district court also denied Devlin's motions for a preliminary injunction, to disqualify counsel, and to strike declarations. In approving the settlement, the district court declared the 1991 COLA Amendment "null and void as of its adoption and of no force or effect." (Supp. J.A. at 948.) On November 24, 1999, Devlin noted his appeal.

On January 4, 2000, Devlin, Hagan, Hewson, Milone, and Rinckwitz, individually and on behalf of REPA, filed a motion in the United States District Court for the Southern District of New York seeking to amend that court's earlier judgment because, they asserted, the District of Maryland erred in approving the settlement, refusing to allow Devlin to intervene, and foreclosing Devlin's right to sue for age discrimination. The Trustees responded by moving in the district court in Maryland to enjoin Devlin under the All Writs Act in an effort to dismiss the New York action and to prevent Devlin from interfering with the Maryland proceedings. On March 10, 2000, the district court in Maryland granted the injunction, concluding that Devlin's purpose in bringing the New York action was to interfere with the settlement.

Devlin raises several arguments on appeal. First, Devlin argues that the district court erred in denying his motion to intervene. Second, Devlin argues that he has standing to appeal from the district court's final order approving settlement even though he did not successfully intervene because he tried to intervene and objected to the settlement at the fairness hearing. Third, Devlin argues that the district court should not

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[9] Federal Rule of Civil Procedure 24(a) relates to intervention of right, and Rule 24(b) relates to permissive intervention.

have approved the settlement. Finally, Devlin argues that the district court's All Writs Act injunction prohibiting him from attacking the settlement in New York was improper under Federal Rule of Civil Procedure 65. We address each argument in turn.

II.

Devlin first argues that the district court erred in denying his motion to intervene. The district court denied Devlin's motion to intervene because it concluded that Devlin's attempt to intervene was "absolutely untimely" (J.A. at 2577) and that Devlin's interests were adequately represented by the Retiree Subclass representative, Santoro. We review the district court's denial of intervention for an abuse of discretion. *See Virginia* v. *Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976).

Devlin sought both intervention of right and permissive intervention. To intervene of right pursuant to Federal Rule of Civil Procedure 24(a), an applicant must satisfy all four of the following requirements: (1) the application must be timely; (2) the applicant must have an interest in the subject matter sufficient to merit intervention; (3) the denial of intervention would impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the existing parties to the litigation. *See* Fed.R.Civ.P. 24(a); *Houston General Ins. Co.* v. *Moore*, 193 F.3d 838, 839 (4th Cir. 1999). Federal Rule of Civil Procedure 24(b), which addresses permissive intervention, provides that "[u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." Fed.R.Civ.P. 24(b). Under either Rule 24(a) or 24(b), the application for intervention must be timely. *See* Fed.R.Civ.P. 24(a) & (b) (requiring "timely application"); *Gould* v. *Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989) ("Both intervention of right and permissive intervention require "timely application."); *see also Houston General*, 193 F.3d at 839 ("[T]imeliness is a cardinal consideration of whether to permit intervention." (internal quotation marks omitted)). Although Rule 24 "requires that the motion to intervene be 'timely,' ... it does not attempt to define the term or specify rigid time limits." *United States* v. *South Bend Community Sch. Corp.*, 710 F.2d 394, 396 (7th Cir. 1983); *see Black* v. *Central Motor Lines Inc.*, 500 F.2d 407, 408 (4th Cir. 1974) (noting that "Rule 24 is silent as to what constitutes a timely application and the question must therefore be answered in each case by the exercise of the sound discretion of the court"). "The purpose of the requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *South Bend*, 710 F.2d at 396. To determine whether an application for intervention is timely, we examine the following factors: how far the suit has progressed, the prejudice that delay might cause other parties, and the reason for the tardiness in moving to intervene. *See Gould*, 883 F.2d at 286. Where intervention is of right, "the timeliness requirement of Rule 24 should not be as strictly enforced as in a case where intervention is only permissive." *Brink* v. *DaLesio*, 667 F.2d 420, 428 (4th Cir. 1981).

We cannot conclude, under any standard of timeliness, that the district court abused its discretion in concluding that Devlin's motion was untimely. Devlin was aware of his interest in the litigation from the outset of the case, as demonstrated by his early and continuous opposition to the removal of the COLA benefits. Nevertheless, instead of participating in the Maryland litigation, he pursued a separate suit in New York and even declined the role of named class representative in the Maryland suit. Only after the New York courts deferred to the Maryland court on the COLA issue did Devlin turn his attention to the Maryland case. At that point, Devlin still did not formally move to intervene. Although Devlin argues that he was not aware of his interest in the settlement until the notice of proposed settlement, Devlin's argument is belied by

his participation in the New York case, as well as by his letters, sent to the district court four months before his formal motion to intervene, that clearly indicate that he knew that his interests might be impacted by the proposed settlement. (*See* J.A. at 469 (Letter of April 20, 1999); J.A. at 731 (Letter of May 12, 1999)); *see Hill* v. *Western Elec. Co.*, 672 F.2d 381, 386 (4th Cir. 1982) ("In a class action the critical issue with respect to timeliness is whether the proposed intervenor moved to intervene as soon as it became clear that the interests of the unnamed class members would no longer be protected by the named class representatives." (internal quotation marks and alterations omitted)); *United States* v. *Pitney Bowes, Inc.*, 25 F.3d 66, 71, 74 (2d Cir. 1994) (affirming denial of intervention where intervenor had constructive knowledge of his interest for 15 months and actual knowledge for eight months); *cf. South Bend*, 710 F.2d at 396 (stating that prospective intervenor generally must move promptly for intervention as soon as he "knows or has reason to know that his interests might be adversely affected by the outcome of the litigation").

We also have no difficulty concluding that Devlin's inexplicable delay prejudiced the parties because, despite his longstanding awareness of his interest in intervening, Devlin waited until the settlement negotiations were complete before seeking formally to intervene. *See Hill*, 672 F.2d at 386 (stating that the "most important consideration (in passing on an application for intervention) is whether the delay has prejudiced the other parties" (internal quotation marks omitted)). Devlin's intervention at that point would have likely resulted in further delay and substantial additional litigation. As the district court noted: "If we went to another stage, another degree of complexity it might make it impossible to achieve any settlement at all no matter how, no matter how much it would be in everybody's interest to achieve it." (J.A. at 2784.) The district court also stated that "more delay wouldn't be to the benefit of the retiree subclass, particularly those who've retired before 1991 ... just more delay, more complexity would make it, might make it impossible ever to resolve this issue which cries for resolution." (J.A. at 2784.); *see County of Orange* v. *Air California*, 799 F.2d 535, 537-38 (9th Cir. 1986) (concluding that motion to intervene was untimely even though filed just two days after the parties notified the district court of proposed settlement because the district court concluded that allowing intervention might undo the resolution of protracted litigation). We agree with the district court that the threat of further delay and the prospect of complicated litigation, which, at that late date might have unraveled the settlement crafted by the parties, were sufficient bases from which to conclude that Devlin's untimely motion to intervene prejudiced the parties. In light of Devlin's delay in seeking to intervene, his lack of explanation for his extended delay, and the prejudice arising from the further delay that would necessarily have followed Devlin's intervention, we cannot conclude that the district court abused its discretion in finding Devlin's motion for intervention untimely.[10] Accordingly, we

[10] Devlin also argues that based upon his objections at the fairness hearing, the district court should have ordered discovery with respect to his argument that his interests were not adequately represented because class counsel and the class representatives had conflicts of interest. We have previously stated, however, in the context of objecting named plaintiffs who were appealing a class action settlement, that" [w]hile [the court] should extend to any objector to the settlement leave to be heard, to examine witnesses and to submit evidence on the fairness of the settlement, it is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision." *Flinn* v. *FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) (internal quotation marks omitted). In other words, "[s]o long as the record before it is adequate to reach an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated and form an educated estimate of the complexity, expense and likely duration of such litigation and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise, it is sufficient." *Id.* (internal quotation marks and alterations omitted). In the present case, the district court thoroughly considered the fairness and adequacy of the settlement, and it had heard evidence not only in this case but from prior related cases as well. Thus, it

affirm the district court's denial of Devlin's motion to intervene.[11]

III.

We next address Devlin's challenge to the class settlement. As a threshold matter, we first must address whether Devlin has standing to challenge the merits of the settlement on appeal even though he failed successfully to intervene below. *See Coyne & Delany Co.* v. *Selman*, 98 F.3d 1457, 1464 n. 6 (4th Cir. 1996) ("Because the issue of standing ... is jurisdictional in nature, we decide it first.").

Devlin asserts that he has standing to challenge the settlement by virtue of his objections at the fairness hearing and his unsuccessful attempt to intervene. The Trustees argue that Devlin was not a named party to the action because he failed to intervene and therefore, he cannot appeal the merits of the settlement. Courts have divided on whether a class member who objects but is denied intervention has standing to appeal

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was informed as to the quality of representation, the issues at hand, and the concerns of the objecting participants. *Cf. In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 159 (4th Cir. 1991) ("Although this settlement was reached so early in the litigation that no formal discovery had occurred, the court found that documents filed by the plaintiffs and evidence obtained through informal discovery yielded sufficient undisputed facts to support the extent of JLI's insolvency and the difficulties plaintiffs would have in proving fraudulent intent under both federal and state securities laws.").

[11] Having concluded that the district court did not abuse its discretion in denying Devlin's motion to intervene, we also conclude that the district court did not err in denying as moot his motions for preliminary injunction, to strike evidence, and to disqualify counsel, which accompanied his motion to intervene. *See Retired Chicago Police Ass'n* v. *City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993) (noting in class action that "[t]he district court recognized that its denial of intervention mooted the putative interveners' other motions"); *cf. Houston General Ins. Co.* v. *Moore*, 193 F.3d 838, 839 (4th Cir. 1999) (affirming non-class-action case in which "[t]he district court denied Beaumont's motion to intervene, thus rendering the motion to vacate the underlying judgment moot").

the merits of the class action settlement. Some courts require successful intervention before a non-named class member may challenge the merits of a class settlement on appeal. *See Felzen* v. *Andreas*, 134 F.3d 873, 874-75 (7th Cir. 1998) (stating, in a shareholder case, that an attempt to intervene is not enough to confer standing and abrogating its former rule that class members and stockholders could appeal without intervening), *aff'd by equally divided Court*, 525 U.S. 315, 119 S.Ct. 720, 142 L.Ed.2d 766 (1999); *Cook* v. *Powell Buick, Inc.*, 155 F.3d 758, 761 (5th Cir. 1998) (stating, in case where would-be intervenors appealed both the denial of intervention and the judgment approving the settlement, that "[i]t is well-settled ... that non-named class members of a certified class may not appeal the final judgment in a class action. Because the proposed intervenors were denied leave to intervene and, thus, never obtained the status of party litigants in this suit, we must dismiss their appeal as to all issues except the denial of their motion to intervene."); *Gottlieb* v. *Wiles*, 11 F.3d 1004, 1008-09 (10th Cir. 1993) (requiring actual party or intervener status for standing and stating that "[p]ermitting unnamed class members to pursue an appeal contrary to the wishes of the named class representatives would effectively substitute the unnamed members for the certified class representatives"); *see also Guthrie* v. *Evans*, 815 F.2d 626, 628-29 (11th Cir. 1987) (describing reasons that individual non-named class members should not have standing to appeal a final judgment binding on the class members).[12] As articu-

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[12] These courts also point to the Supreme Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (per curiam). In *Marino*, the Supreme Court addressed in a non-class action whether police officers who were not parties could challenge a consent decree settling a Title VII lawsuit against the City of New York where the officers had objected to the settlement at the fairness hearing but had not moved to intervene either on appeal or before the district court. The Court affirmed the Court of Appeals for the Second Circuit's conclusion that "because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the

lated by the Sixth Circuit, "a mere voluntary appearance to state or file objections is an insufficient basis for standing to appeal," although "a non-named class member has standing to

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consent decree approving that lawsuit's settlement." *Id.* at 304. In so holding, the Court reiterated the rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment" and noted that "[t]he Court of Appeals suggested that there may be exceptions to this general rule, primarily when the nonparty has an interest that is affected by the trial court's judgment. *We think the better practice is for such a nonparty to seek intervention for purposes of appeal;* denials of such motions are, of course, appealable." *Id.* (internal quotation marks omitted and emphasis added).

The Seventh Circuit, in *Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd by equally divided Court*, 525 U.S. 315, 119 S.Ct. 720, 142 L.Ed.2d 766 (1999), reads *Marino* broadly to support its conclusion that a class member must formally become a party to appeal the final decision in derivative or class action litigation. *See id.* at 875-77. Neither the Tenth Circuit's decision in *Gottlieb* v. *Wiles*, 11 F.3d 1004 (10th Cir. 1993), nor the Eleventh Circuit's decision in *Guthrie* v. *Evans*, 815 F.2d 626 (11th Cir. 1987), relies upon *Marino;* rather, these courts rely upon practical policy concerns underlying Federal Rule of Civil Procedure 23 to conclude that successful intervention is a prerequisite to appellate standing. The Third Circuit has distinguished *Marino* on the grounds that *Marino* did not involve members of a class action who were objecting to a class settlement and that the plaintiffs in *Marino* had not attempted to intervene below, although they had objected to the consent decree at a hearing before the district court. *See Bell Atlantic Corp.* v. *Bolger*, 2 F.3d at 1307 (recognizing *Marino* 's holding that generally only parties may appeal but stating that "it is not settled whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's approval of the compromise"); *cf. also Kaplan* v. *Rand*, 192 F.3d 60, 67-68 (2d Cir. 1999) (rejecting the Seventh Circuit's broad reading of *Marino* in *Felzen*); *Shults* v. *Champion Int'l Corp.*, 35 F.3d 1056, 1061 (6th Cir. 1994) (recognizing that "*Marino* addressed the standing to appeal of non-parties and not ... of non- representative members of a class or derivative suit," but concluding that "*Marino* supports the notion that persons who are not proper parties should overcome *some additional hurdle* before attaining, for purposes of appeal, party status" (emphasis added)). We agree with those courts that have declined to apply *Marino* in the context of a non-named class member seeking to appeal from the final judgment in a class action.

appeal a settlement order if he has formally intervened in the action" or "if a motion to intervene, which is then appealed, should have been granted." *See Shults* v. *Champion Int'l Corp.*, 35 F.3d 1056, 1061 (6th Cir. 1994). Other courts, by contrast, broadly permit non-named class members to appeal the merits of a class settlement where they objected or tried to intervene below. *See In re PaineWebber Inc. Ltd. Partnerships Litigation*, 94 F.3d 49, 53 (2d Cir. 1996) (stating that individual non-named members of the class can appeal the district court's approval of the settlement as unfair "if they objected to the proposed settlement at the Rule 23 hearing"); *Carlough* v. *Amchem Prods.*, 5 F.3d 707, 710 (3d Cir. 1993) (stating that the district court's denial of a motion to intervene is not immediately appealable because "the objecting class members will be able to appeal from any final order entered in the district court"); *see also Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977) (stating that "[a]s members of the class, their legal rights are affected by the settlement and they have standing to sue"). We have not previously addressed this issue in a published decision.[13]

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[13] In the non-class action context, we have stated that

> persons who are neither original parties to, nor intervenors in, district court proceedings ordinarily may not appeal a judgment of the district court, [t]his rule ... is not without exception. For example, a person who [1] has an interest in the cause litigated and [2] has participated in the proceedings actively enough to make him privy to the record may appeal despite the fact that he was not named in the complaint and did not intervene.

Davis v. *Scott*, 176 F.3d 805, 807 (4th Cir. 1999) (internal quotation marks omitted). *But see Gottlieb* v. *Wiles*, 11 F.3d 1004, 1007 (10th Cir. 1993) (stating that because "Rule 23 was intended to promote the efficient resolution of claims in cases involving multiple parties with similar claims, to eliminate repetitious litigation, and to avoid inconsistent judgments .... [c]ases addressing standing in other contexts are therefore inapplicable," including cases permitting non-parties in non- class actions to appeal where they have interests in the litigation).

Those courts that have required actual intervention as a prerequisite to standing generally have relied upon the following rationale, first articulated by the Eleventh Circuit in *Guthrie:*

> There are essentially three reasons for holding that individual, non-named, class members do not have standing to appeal a final judgment binding on the class members. First, such individuals cannot represent the class absent the procedures provided for in Rule 23 of the Federal Rules of Civil Procedure. Second, class members who disagree with the course of a class action have available adequate procedures through which their individual interests can be protected. Third, class actions could become unmanageable and nonproductive if each member could individually decide to appeal.

Guthrie, 815 F.2d at 628. The Tenth Circuit in *Gottlieb* explained that

> Rule 23 was intended to promote the efficient resolution of claims in cases involving multiple parties with similar claims, to eliminate repetitious litigation, and to avoid inconsistent judgments. To that end, the Rule elaborates comprehensive procedures to be followed in class actions. These procedures represent a careful balancing of the need for efficiency with the need to ensure adequate protection for the individual members of the class, factors not present in non-class action contexts.

Gottlieb, 11 F.3d at 1007 (internal citation omitted). In essence, these courts have reasoned that permitting non-named class members to appeal absent successful intervention fragments the class by allowing individual class members to relitigate the action without having to show that they are capable of fairly and adequately representing the class. *See id.* at 1008. These courts also note that "[s]ince a denial of a motion to intervene of right is immediately appealable, the interests of the unnamed class members are adequately protected." *Id.*

at 1008-09. Thus, "the policy underlying class actions under Rule 23 is best served by requiring an unnamed class member in a class action under Rule 23 to move formally to intervene and to be granted intervenor status in order to gain standing to appeal the adequacy of the settlement." *Gottlieb*, 11 F.3d at 1012. In sum, the formal intervention requirement is predicated upon concerns of adequate representation, avoiding fragmentation of the class, and the existence of adequate procedural protections.

Those courts that permit unnamed class members to appeal where they have objected below or unsuccessfully tried to intervene rely upon the rationale that "small claimants who could not litigate their claims absent the class action mechanism could be left with 'equally unpalatable alternatives--accept either nothing at all [by opting out] or a possible unfair settlement[by opting in but lacking standing to appeal].' " *Bell Atlantic,* 2 F.3d at 1309 (quoting *Ace Heating & Plumbing Co.* v. *Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971)).[14] Like-wise, these courts have been concerned with collective action problems and "agency costs":

> Frequently, in class or derivative litigation the number of clients is large and the individual injuries small (though, of course, when aggregated they can be and often are quite large). Courts and commentators have long recognized the "agency costs" inherent in class and derivative actions where the client, as principal, is neither well-situated nor adequately motivated to closely monitor and control the attorney, his agent. Shareholders with well- diversified portfolios or small holdings lack the incentive and information to police settlements--the costs

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[14] *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304 (3d Cir.1993), addressed the question of appellate standing in a shareholder derivative suit. However, the Third Circuit assumed for the purposes of its analysis that the same "rules apply to objector appellate standing in class and derivative suits." *Id.* at 1307 n. 4.

> of policing typically outweigh any pro rata benefits to the shareholder.

Id. (internal footnotes omitted). These collective action and agency costs are exacerbated by informational constraints inherent in class actions, and, as a result, "[t]he effort to obtain court approval entails the suspension, if not termination, of hostilities. In assessing settlements of representative actions, judges no longer have the full benefit of the adversarial process." *Id.* at 1310. Thus, "[t]he parties can be expected to spotlight the proposal's strengths and slight its defects. In such circumstances, objectors play an important role by giving courts access to information on the settlement's merits." *Id.*[13] In sum,

> [g]iven the agency, collective action, and information problems inherent in settlements of derivative litigation, and the broad view of objector standing embodied in *Ace,* we conclude [that the non-named plaintiff who objected below] had standing to appeal the district court order approving the settlement. *Assuring fair and adequate settlements outweighs concerns that non-intervening objectors will render the representative litigation "unwieldy."* It is sufficient that [the non-named plaintiff] attended the settlement hearing and voiced before the district court the same objections he now raises before us on appeal.

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[13] The court in *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304 (3d Cir. 1993), also pointed to the risk that

> plaintiffs' counsel and the defendants will structure a settlement such that the plaintiffs' attorneys' fees are disproportionate to any relief obtained for the corporation. Plaintiffs' attorneys and the defendants may settle in a manner adverse to the interests of the plaintiffs by exchanging a low settlement for high fees. Such a risk cautions against creating obstacles to challenging derivative action settlement agreements.

Id. at 1310. In the present case, counsel were compensated on an hourly basis by the Plan and by TCU.

Id. (emphasis added).

A crucial difference between the approach of the majority of courts, as first articulated in *Guthrie,* and that of the minority of courts, as articulated in *Bell Atlantic,* is the way in which the courts balance class management concerns against fairness concerns. A majority of courts require successful intervention below as a prerequisite to appellate standing because they place a greater emphasis on the need for efficiency and effective class management, *see Gottlieb*, 11 F.3d at 1007 (relying upon the purpose of Rule 23 to "promote the efficient resolution of claims in cases involving multiple parties with similar claims"), whereas a minority of courts place a greater emphasis on the need to ensure the fairness and adequacy of class action settlements, *see Bell Atlantic,* 2 F.3d at 1309 (expressing concern that collective action and agency costs fail to ensure fair and adequate settlements).

We agree with the majority of courts that the need for effective class management and to avoid class fragmentation weighs strongly in favor of limiting the possibility that last-minute "spoilers" who were not entitled to intervene below might unduly delay class settlement on appeal. We fail to see how effective class management can be accomplished if non-named class members who were not entitled to intervene before the district court can nevertheless usurp the role of the class representatives and, in effect, act as intervenors by contesting the merits of the class settlement on appeal.

We also recognize, however, the importance of ensuring that non- named class members can appeal the merits of the class settlement where intervention was wrongfully denied below. With these competing concerns in mind, we believe that the best approach is that articulated by the Sixth Circuit in *Shults:*

> a non-named class member has standing to appeal a settlement order if he has formally intervened in the action (indeed, non-parties generally obtain such standing upon

> intervention). *However, a non-named party that has not been permitted to intervene may also have standing to bring a direct appeal if a motion to intervene, which is then appealed, should have been granted.* A nonnamed party may also have standing to appeal if the district court has otherwise "summoned" him into court. Of course, as the Supreme Court has indicated, "the better practice is ... to seek intervention for purposes of appeal." *Marino*, 484 U.S. at 304, 108 S.Ct. at 588. But a mere voluntary appearance to state or file objections is an insufficient basis for standing to appeal.

Shults, 35 F.3d at 1061 (emphasis added). We believe that this approach best balances the need to protect non-named class members against a wrongful denial of intervention below and the need to prevent nonmeritorious or untimely motions for intervention from unduly interfering with or delaying class settlement. We therefore hold that a non-named class member who unsuccessfully moves for intervention below may still have standing to appeal the substance of the class settlement if he was wrongfully denied intervention. But, where, as here, intervention was properly denied, the non-named class member does not have standing to contest the merits of the class settlement on appeal.[16]

The dissent posits that an unnamed class member who objects but fails successfully to intervene below should be able to appeal the approval of a class action settlement. While it is true that the settlement affects the unnamed class members'

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[16] Although the dissent argues that class members have standing to object to the settlement at the district court and that "[i]t is inconsistent with due process to deny the same class member standing to appeal the settlement order after he has exercised his right to object in district court," (Dissent, at 30), our decision does not deny standing to a non-intervenor who seeks to appeal the denial of a right to object to the settlement at the fairness hearing. *See supra*, note 10 (discussing Devlin's argument that the district court failed to order discovery to resolve his objection at the fairness hearing that his interests were not adequately represented).

interests, the purpose of securing class representatives is to ensure that the unnamed class members' interests are adequately protected. If the unnamed class member's interests are not adequately protected by the class representatives, the district court should grant the motion to intervene. Any unnamed class members whose interests were not adequately protected by the class representatives and who filed a motion to intervene that was wrongfully denied will be afforded the opportunity to appeal the class settlement. Thus, our rule strikes the appropriate balance between the dissent's concern over fairness to unnamed class members and concerns over efficiency and effective class management.

Additionally, merely requiring unnamed class members to object to the settlement as a prerequisite to their right to appeal does not adequately protect concerns about efficiency and effective class management because if the district court does not agree with the objections of the unnamed class members, it will proceed to approve the class settlement. Allowing appeals from each unnamed class member after approval of the class settlement implicates the precise management and efficiency concerns with which the class action system is concerned. Indeed, the facts of the present case provide an almost paradigmatic example of the "spoiler" effect that would follow from the minority view espoused by the Second, Third, and Ninth Circuits; here, Devlin sat on the sidelines while the class settlement was crafted, despite knowing for months that his interests were at stake. Devlin then objected and sought to intervene at nearly the last moment, at a point and time at which, as the district court recognized, acceptance of his objections "might [have] ma[de] it impossible to achieve any settlement at all no matter how, no matter how much it would be in everybody's interest to achieve it." (J.A. at 2784.) Accordingly, because the district court did not abuse its discretion in denying Devlin's untimely motion for intervention, Devlin does not have standing to challenge the merits

of the class settlement on appeal.[17]

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[17] We note that one of the bases for Devlin's challenge to the class settlement is his assertion that COLA benefits are accrued benefits that could not be eliminated by amendment without prior notice to and approval from the Secretary of Labor. *See* 29 U.S.C.A. § 1054(g)(1) (West 1999) (providing that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title"); 20 U.S.C.A. § 1082(c)(8) (West 1999) (providing that "[n]o amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment, or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment."). Because the Trustees did not follow this procedure, Devlin asserts that the settlement is void insofar as it is based upon illegal consideration. *See Collins* v. *Seafarer's Pension Trust*, 846 F.2d 936, 939 (4th Cir. 1988) ("[T]he failure to give adequate notice of the amendment and thus to trigger the requisite determination by the Secretary vitiates the effectiveness of the amendment.").

Although we do not decide this issue, we note that the nullification of the 1991 Amendment was ultimately not the product of the 1997 Amendment, but rather was the product of the district court's declaration that "[t]he amendment to the Plan ... providing for an automatic cost of living adjustment effective January 1, 1991 is null and void as of its adoption and of no force or effect." (Supp. J.A. at 948.) In other words, it was not a Plan amendment that revoked the COLA increases, but rather the district court's final order declaring the 1991 Amendment void.

We further note that it is at best unclear whether the 1991 COLA amendment constitutes an accrued benefit for participants such as Devlin who retired prior to the 1991 Amendment. Although the Seventh Circuit in *Hickey* v. *Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992), concluded that COLA benefits are accrued benefits, *id.* at 468, it did not address whether COLA benefits are accrued benefits with respect to plan participants who retired prior to the implementation of the COLA benefits. *Cf. Isby* v. *Bayh*, 75 F.3d 1191, 1196-97 (7th Cir. 1996) (stating that the court's focus in determining whether to accept a proposed settlement should be "upon the general principles governing approval of class action settlements" and that the court "must not decide unsettled legal questions" (internal quotation marks omitted)); *cf. also Flinn* v. *FMC Corp.*, 528 F.2d 1169, 1172-73 (4th Cir. 1976) (stating that the trial court should not transform the settlement hearing into "a trial or rehearsal for trial," nor should it "reach any dispositive conclusions on the admittedly unsettled legal issues in the case" (internal quotation marks omitted)).

IV.

Finally, Devlin argues that the district court erred in enjoining him from attacking the settlement in the Southern District of New York because it failed to follow the requirements of Fed.R.Civ.P. 65. Devlin also argues that the district court failed to require the Trustees to post a bond and that it impaired Devlin's right of access to the courts. In addition, Devlin asserts that his conduct in New York did not constitute a collateral attack against the settlement because the New York case did not relate to the proposed settlement. We review a district court's grant of a motion under the All Writs Act for an abuse of discretion. *See March* v. *Kittay*, 988 F.2d 498, 500 (4th Cir. 1993).

Under the All Writs Act, 28 U.S.C.A. § 1651(a), a federal court may enjoin parties before it "from attempting to relitigate decided issues and to prevent collateral attack of its judgments."[18] *March*, 988 F.2d at 500. Federal Rule of Civil Procedure 65(d) provides that "[e]very order granting an injunction ... shall set forth the reasons for its issuance; shall be specific in its terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Fed.R.Civ.P. 65(d). "These terms are mandatory and must be observed in every instance." *Alberti* v. *Cruise*, 383 F.2d 268, 271-72 (4th Cir. 1967). "The

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[18] 28 U.S.C.A. § 1651 provides that

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C.A. § 1651 (West 1994).

specificity provisions of Rule 65(d) are no mere technical requirements." *CPC Int'l, Inc.* v. *Skippy Inc.*, 214 F.3d 456, 459 (4th Cir. 2000) (internal alterations and quotation marks omitted). Rather, Rule 65(d) "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. *Id.* "Moreover, without specificity, appellate review of an injunctive order is greatly complicated, if not made impossible. Rule 65(d) thus serves the twin purposes of providing fair notice of what an injunction requires and of facilitating appellate review." *Id.*

In the present case, Devlin filed a motion to alter or amend in the Southern District of New York in which he alleged that the District of Maryland's refusal to allow him to intervene

> constitute[d] extraordinary circumstances that both were clearly erroneous and ... caused a manifest injustice to plaintiffs (a) by depriving plaintiffs of constitutional rights including due process rights, and the right of access to federal courts ... and (b) by depriving them of their right to litigate their age discrimination claims before a jury ... in a court of competent jurisdiction that is accessible and available to them, notwithstanding their limited financial resources, and by counsel of their own choosing.

(Supp. J.A. at 1040-41.) The district court granted the Trustee's motion under the All Writs Act, ordering Devlin "to dismiss the pending action in the Southern District of New York" and enjoining Devlin and "all members of the defendant class ... from making any filing in any forum against any person, including counsel in this case or their law firms, that raises issues encompassed within the settlement of this action or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court." (Supp. J.A. at 129-30.)

Devlin argues that the district court's All Writs Act injunction fails to satisfy Rule 65 because the injunction does not adequately set forth the reasons for its issuance.[19] We must determine, therefore, whether Rule 65 applies to an All Writs Act injunction issued in aid of the district court's jurisdiction. We conclude that it does; indeed, we have previously analyzed the two together in affirming a district court's issuance of an injunction, although we have not explicitly held that an All Writs Act injunction is invalid where it fails to satisfy Rule 65. *See March*, 988 F.2d at 500 ("[T]he district judge did not abuse her discretion, but rather acted within her authority under the All Writs Act ..., as well as, the Federal Rules of Civil Procedure, Rule 65."); *see also Florida Med. Assoc.* v. *U.S. Dept. of Health, Educ. & Welfare*, 601 F.2d 199, 202 (5th Cir. 1979) (stating that "the All Writs Act does

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[19] Relying upon *Hoechst Diafoil Co.* v. *Nan Ya Plastics Corp.*, 174 F.3d 411 (4th Cir. 1999), Devlin also argues that the injunction is defective because Rule 65(c) requires that the district court fix a bond when it grants an injunction. *See id.* at 421 (requiring that the "district court ... fix a bond whenever it grants a preliminary injunction or restraining order"). The district court did not require the Trustees to post a bond of any amount prior to issuing the injunction. However, the structure and plain text of Rule 65 make clear that the district court was not required to order the Trustees to post a bond pursuant to Rule 65(c). Although the title of Rule 65 applies generally to all injunctions, Rule 65(c) only applies to "restraining order[s]" and "preliminary injunction[s]." *Compare* Fed.R.Civ.P. 65(c) (providing that "[n]o *restraining order* or *preliminary injunction* shall issue except upon the giving of security by the applicant" (emphasis added)) *with* Fed.R.Civ.P. 65(d) ("*Every order* granting *an injunction* and *every restraining order* shall set forth the reasons for its issuance .... " (emphasis added)). Because Rule 65 clearly differentiates between preliminary injunctions and injunctions for purposes of Rule 65(c), and because this injunction does not qualify as a preliminary injunction, we conclude that the injunction is not subject to Rule 65(c)'s bond requirement. We further note if the district court were required to comply with Rule 65(c)'s bond requirement as a prerequisite to an All Writs Act injunction, its ability to protect its own jurisdiction would be tied to a party's ability to post a bond. As a result, the district court would be rendered powerless to protect its own jurisdiction where the party is unable to post a bond.

not free a district court from the restraints of Rule 65."); *Wood* v. *Santa Barbara Chamber of Commerce*, 705 F.2d 1515, 1525 (9th Cir. 1983) (finding that injunction against relitigation, issued under the All Writs Act, "is specific enough to satisfy the requirements of Federal Rule of Civil Procedure 65(d)"). *But see In re Johns-Manville Corp.*, 27 F.3d 48, 49 (2d Cir. 1994); *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985) ("While the issuance of the injunction here did not comply with the requirements that [Rule 65] prescribes for the issuance of preliminary injunctions, this is not a fatal defect."). The Fifth Circuit in *Florida Medical Association* explicitly concluded that Rule 65 applies to All Writs Act injunctions, reasoning that "[w]hile the All Writs Act empowers a district court to fashion extraordinary remedies when the need arises, it does not authorize a district court to promulgate an ad hoc procedural code whenever compliance with the Rules proves inconvenient.... Rule 65 provides sufficient protection for the jurisdiction of the district court." *Florida Med. Assoc.*, 601 F.2d at 202. In other words, the Fifth Circuit saw no reason to distinguish between All Writs Act injunctions and other injunctions that must comply with Rule 65. We agree. Notably, we have previously stated that Rule 65(d) "applies generally to equitable decrees compelling obedience under the threat of contempt." *See Skippy*, 214 F.3d at 459 (internal quotation marks and alterations omitted). This broad language informs our conclusion that Rule 65 applies to injunctions issued under the All Writs Act because an All Writs Act injunction, like any other injunction, compels obedience under the threat of contempt. An All Writs Act injunction likewise implicates the same twin purposes of providing fair notice of what an injunction requires and of facilitating appellate review. *Id.*

Having concluded that Rule 65 applies to All Writs Act injunctions, we next must determine whether the district court's injunction in this case complies with Rule 65. Although we are reluctant to impose unnecessary obstacles on

the district court's ability to decisively protect its jurisdiction from collateral attack, particularly where, as here, it is clear that Devlin was seeking to undermine the district court's approval of the class settlement, we nevertheless conclude that the district court's injunction fails to satisfy Rule 65 because the injunction fails to set forth adequate reasons for its issuance.[20] We therefore remand the district court's injunction under the All Writs Act for further clarification.[21]

V.

In conclusion, the district court did not abuse its discretion in denying Devlin's motion to intervene, and, thus, Devlin does not have standing to contest the merits of the class settlement on appeal. We reverse and remand the district court's All Writs Act injunction prohibiting Devlin from attacking the settlement in another jurisdiction because the district court did not adequately set forth its reasons for the injunction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[20] The district court relied upon the conclusory statement that it is "upon finding that an injunction is necessary and appropriate in aid of this Court's jurisdiction." (Supp. J.A. at 129.) The district court did orally set forth its reasons at the hearing. (Supp. J.A. at 938-41 ("The case in New York right now is absolutely an attack on this litigation and the settlement. It is not simply a derivative case seeking to increase assets of the plan.").)

[21] Devlin also argues that the district court improperly impaired his access to the courts. We note, however, that the injunction explicitly leaves Devlin the option of pursuing an action in the District of Maryland, and he is not precluded from litigating in any court any matter not connected with this litigation. Thus, we fail to see how the district court has improperly impaired Devlin's access to the court system. Likewise, although Devlin argues that his post-injunction motion, filed five days after the injunction, was not an attack on the settlement, his post- injunction motion clearly invites the Southern District of New York to undermine the basis for the District of Maryland's approval of the settlement. We have no difficulty concluding that Devlin's motion was an attack on the District of Maryland's judgment.

MICHAEL, Circuit Judge, concurring in part and concurring in the judgment:

The only fair rule gives the right of appeal to an unnamed class member who objects to a settlement in district court. This rule, which is steeped in tradition and followed in three of our circuits, does not burden the class action system. I therefore respectfully disagree with the majority's decision, stated in part III of its opinion, that an objecting class member who does not intervene lacks standing to appeal a settlement order. Nevertheless, because I otherwise agree with the majority, I concur in the judgment and in parts I, II, and IV of the court's opinion.

I.

An unnamed class member has the right to object in district court to a proposed class action settlement. *See Gould* v. *Alleco*, 883 F.2d 281, 284 (4th Cir. 1989); 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1797, at 376 (2d ed.1998). Typically, the unnamed class member may file written objections and appear at the fairness hearing to contest the reasonableness of the proposed settlement. *See* 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 11.56, at 11-139 (3d ed.1992). Although a district court has considerable leeway in controlling the course and scope of fairness proceedings, an objector is generally entitled "to be heard, to examine witnesses and to submit evidence on the fairness of the settlement." *Flinn* v. *FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975). The rights of an unnamed class member who objects to a settlement should not be cut off as he walks out the door of the district court. Indeed, better reasoned precedent holds that an unnamed, objecting class member has standing to appeal a district court order approving a class action settlement. *See In re PaineWebber, Inc. Ltd. P'ships Litig.*, 94 F.3d 49 (2d Cir. 1996); *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304 (3d Cir. 1993); *Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977); *see also* 7B Wright et al., *supra*, § 1797, at 360-61 ("Of course, if the

class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise [of the class action] on appeal from the entry of the final judgment."). The rule that allows an unnamed class member to appeal a settlement order is rooted in early American equity jurisprudence. Under the old equity rules, cases could be brought by representative parties: when "parties are exceedingly numerous, and it would be impracticable to join them ... the court will not insist upon their being made parties; but will dispense with them, and proceed to a decree." Joseph Story, *Commentaries on Equity Pleadings* § 94 (10th ed. 1892). And, those "who are not directly made parties" have the right to "come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing." *Id.* § 96. In other words, if an unnamed party was bound by the decree, he had the right to take an appeal. Today, it is still fair and efficient to allow an unnamed class member to appeal an order approving a class settlement, as long as he has presented his objections in district court.

First, the unnamed class member's legal rights are affected by the order approving the settlement. This gives the class member standing to object to the settlement in district court. *See Petrovic* v. *Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999) (holding that an unnamed class member has a due process right to object at the fairness hearing). It is inconsistent with due process to deny the same class member standing to appeal the settlement order after he has exercised his right to object in district court. *Cf. Philips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed.2d 628 (1985) (noting that an unnamed class member has a due process right "to be heard and participate in [class action] litigation" in state court).

Second, the unnamed class member, as a prerequisite for appeal, must state his objections to the settlement in district court. The class representatives and the defendants thus face potential appeals only from those unnamed class members

whose objections are denied in district court. In most instances an objector will have little incentive to appeal because the projected expenses will outweigh the potential for convincing the appeals court that the district court abused its discretion in approving a settlement after considering the objector's concerns.

Third, affording unnamed class member-objectors the right to appeal serves to encourage fair settlements in class action cases. As the Third Circuit has said, class actions present the risk that

> [p]laintiffs' attorneys and the defendants may settle in a manner adverse to the interests of the plaintiffs by exchanging a low settlement for high fees.... The effort to obtain court approval entails the suspension, if not termination, of hostilities. In assessing settlements of representative actions, judges no longer have the full benefit of the adversarial process. In seeking court approval of their settlement proposal, plaintiffs' attorneys' and the defendants' interests coalesce and mutual interest may result in mutual indulgence. The parties can be expected to spotlight the proposal's strengths and slight its defects. In such circumstances, objectors play an important role by giving courts access to information on the settlement's merits.

Bell Atl. v. Bolger, 2 F.2d 1304, 1310 (3d Cir.1993) (footnote and citations omitted). Moreover, when everyone involved--the class representatives, the defendants, the lawyers, and even the trial judge--knows that an objector has the right to appeal, it stands to reason that a settlement proposal will be designed and scrutinized with more care.

Fourth, we have not been presented with any evidence that objector appeals have gummed up the works in the circuits (the Second, Third, and Ninth) where they are expressly allowed. Class action litigation is plenteous in the district courts in these circuits, and there is no indication that the circuit courts have been faced with an unmanageable avalanche of appeals by objectors to class action settlements. Nor is there any indication that plaintiffs are reluctant to become class representatives or that plaintiffs' lawyers are reluctant to file class actions because unnamed, objecting class members have the right to appeal. In short, the objector appeal right does not appear to be causing the class management and fragmentation problems that worry the majority.

Fifth, the rule authorizing objector appeals actually promotes efficiency in the class action system. For example, the unnamed Rule 23(b)(3) class member who knows he has the right to appeal is less likely to opt out of the class because he will have the opportunity, after objecting, to appeal any settlement order he regards as unfair. In addition, the availability of appellate review of the denial of a class member's objections will lessen the possibility of collateral attacks on settlement orders. *See, e.g., Walker* v. *City of Mesquite*, 858 F.2d 1071, 1075 (5th Cir. 1988) (recognizing that unnamed class members may "challenge the adequacy of class representation ... by filing a separate lawsuit for that purpose"). With the right to appeal in place, a disgruntled class member will have more incentive to pursue his objections in the core action instead of waiting to launch a collateral attack on the judgment in separate litigation.

Finally, the majority's approach--requiring an unnamed class member to formally intervene before he can appeal--is unduly burdensome to class members and creates its own inefficiencies. As the majority notes, an intervention application must be timely. *See* Fed.R.Civ.P. 24(a). Yet the majority fails to recognize that most unnamed class members receive very little information about their case as it goes along. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L.Rev. 1, 20 (1991). Indeed, most unnamed class members do not realize that they might have an objection until they re-

ceive notice of the fairness hearing at the end of the litigation. This lack of information makes it difficult for unnamed class members to make timely decisions to seek intervention in an effort to protect their interests. The intervention requirement also has the potential to waste judicial resources, and it will not lead to quicker resolution of cases. The intervention requirement will place more work on the district courts who will have to deal with motions to intervene in addition to the fairness proceedings. Of course, if intervention motions are denied, the unnamed class members will be able to appeal the denials. The intervention alternative adopted by the majority therefore does nothing to take care of its concern about "delay[ing] class settlement on appeal." *Ante* at 21. At bottom, the majority's approach forces costly intervention motions, creates more work for the district courts, produces about the same amount of work for the court of appeals, and delays final resolution without providing any meaningful benefit. On the other hand, a rule that allows objecting, unnamed class members to appeal keeps the focus strictly on the merits, that is, whether the settlement is fair and reasonable.

I firmly but respectfully disagree with the majority's intervention requirement that denies appeal rights to unnamed class members. Giving unnamed, objecting class members the right to appellate review is much better insurance against unfair class action settlements. The latter approach appears to be working in three of our busiest circuits, and it will work here, too.

II.

I now turn to how I would deal with Robert Devlin's appeal, which is before us. The district court denied his motion to intervene as untimely, and I (like the majority) would affirm that ruling. I, of course, disagree with the majority's decision that Devlin lacks standing to appeal the order approving the settlement agreement. Because Devlin filed objections to the proposed settlement in the fairness proceedings, I would hold that he has standing to appeal. Nevertheless, after

considering the merits, I would affirm the district court's order approving the settlement. As the majority points out, the "district court thoroughly considered the fairness and adequacy of the settlement," *ante* at 14 n. 10, giving careful consideration to Devlin's objections. Devlin objected to the settlement because it nullified the 1991 COLA amendment. The COLA amendment had the effect of substantially increasing benefits to participants who retired before January 1, 1991. Because the removal of the COLA reduced the retirement benefits of pre-1991 retirees, Devlin argued that the settlement was unfair in that it adversely affected the pre-1991 retiree subclass. The district court found, however, that restoration of the COLA would jeopardize the viability of the retirement plan and would compromise the interests of the pre-1991 retiree subclass and the active subclass. The court concluded that Devlin's position "was absolutely destructive of everybody's rights and interests" and would "steer the ship onto the rocks." A review of the record of the fairness proceedings reveals that the district court fully analyzed the proposed settlement for fairness and adequacy in accordance with the *Jiffy Lube* factors. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). The district court's decision to approve the settlement was well within its discretion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

R.A. SCARDELLETTI, et al.	)	
Plaintiffs,	)	
v.	)	Civil Action
	)	No. JFM-97-3464
ANTHONY SANTORO, SR., et al.	)	
Defendants.	)	

ORDER

Upon consideration of the cross-motion of Robert J. Devlin, filed on September 10, 1999, to intervene as a party to this action pursuant to Fed. R. Civ. P. 24(a) and (b), the motion is denied for the reasons stated in open court on November 12, 1999, during the hearing on the fairness and adequacy of the proposed settlement of this action.

Upon consideration of the motions for other relief contained in the cross-motion, those motions are denied as moot.

Upon consideration of the motions for a preliminary injunction and for other relief filed by Robert J. Devlin on November 12, 1999, the motions are denied as moot.

Dated: March 15, 2000

/s/
J. Frederick Motz
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

R.A. SCARDELLETTI, et al.	)	
Plaintiffs,	)	
v.	)	Civil Action
	)	No. JFM-97-3464
ANTHONY SANTORO, SR., et al.	)	
Defendants.	)	

FINAL ORDER

This matter having come before the Court on the motion of the plaintiffs for approval of the settlement set forth in the Settlement Agreement and Release ("Settlement Agreement"), and the responses of the Defendant Class thereto, and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed and good cause appearing therefore, it is

ORDERED, ADJUDGED AND DECREED THAT:

1. For purposes of settlement, the Defendant Class is defined to consist of all active, terminated vested and retired participants in the Transportation Communications International Union Staff Retirement Plan ("Plan") and their beneficiaries, except R.A. Scardelletti, Frank Ferlin, Jr., Joel Parker, Don Bujold, Howard Randolph, Mitchell M. Kraus, Donald A. Bobo, R.I. Kilroy, F.T. Lynch and Frank Mazur; and the Defendant Class is divided into a Retiree Subclass made up of all members of the Defendant Class who retired or terminated

service under the Plan prior to January 1, 1999, and their beneficiaries; and an Active Subclass, made up of all members of the Defendant Class who had not retired or terminated service under the Plan prior to January 1, 1999, and their beneficiaries.

2. The requirements to certify a class under Rule 23(b)(1) of the Federal Rules of Civil Procedure for purposes of settlement have been satisfied and the Defendant Class is certified for settlement purposes under Rule 23(b)(1) of the Federal Rules of Civil Procedure.

3. The notice given to the Defendant Class concerning the Settlement Agreement provided fair and reasonable notice to the Defendant Class of the nature of this action, the proposed settlement, and the right to appear and be heard concerning the proposed settlement and satisfied the order of this Court concerning notice to the Defendant Class and the requirements of Rule 23 of the Federal Rules of Civil Procedure.

4. The Settlement Agreement is approved and is, in all respects, fair, reasonable and adequate to the Defendant Class and all of its members in accordance with Rule 23 of the Federal Rules of Civil Procedure and was negotiated and entered into in good faith.

5. The amendment to the Plan adopted October 13, 1990 providing for an automatic cost of living adjustment effective January 1, 1991 is null and void as of its adoption and of no force or effect and Article 5.5(a) of the Plan document Restated to Reflect All Amendments Adopted Through March 3, 1999 is null and void and shall not be enforced.

6. Without affecting the finality of this Order, the Court retains jurisdiction over implementation and enforcement of the Settlement Agreement.

7. This action is dismissed with prejudice.

Dated: March 15, 2000

/s/
J. Frederick Motz
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

R.A. SCARDELLETTI, et al.	)	
Plaintiffs,	)	
v.	)	Civil Action
	)	No. JFM-97-3464
ANTHONY SANTORO, SR., et al.	)	
Defendants.	)	

ORDER GRANTING PRELIMINARY INJUNCTION

This matter came before the Court on the motion of Plaintiff Trustees for a preliminary injunction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). Upon consideration of the motion, the memorandum in support thereof, and the opposition thereto, and upon finding that an injunction is necessary and appropriate in aid of this Court's jurisdiction, it is hereby

ORDERED, that he motion is GRANTED, and it is further

ORDERED that Messrs. Devlin, Hagan, Hewson and Rinckwitz, and REPA, are hereby enjoined to dismiss the pending action in the Southern District of New York captioned Devlin, et al. v. Scardelletti, et al., No. 00 Civ. 43 (S.D.N.Y.); and it is further

ORDERED, that Devlin, Hagan, Hewson, Rinckwitz and REPA, as well as all members of the defendant class, are enjoined from making any filing in any forum against any per-